Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

No. 05-08

IN THE

Supreme Court of the United States

BONNIE G. SNAVELY,

Petitioner,

v.

DOUGLAS MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

LONNIE J. DALE
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, MT 59806-4947
(406) 728-1455

Counsel for Respondent

195697

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

TABLE OF APPENDICES iv

RESTATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

I. Factual Background and Proceedings 2

REASONS FOR DENYING THE PETITION 7

I. Petitioner Misstates the Record and the Cornerstone of Petitioner's Argument Is Jurisdictionally Barred 8

II. There Is No Circuit Split on the Application of the Probate Exception 10

A. The Fifth and Eleventh Circuits 10

B. The Fourth, Sixth, Eighth, and Tenth Circuits 11

C. The First, Third, and Seventh Circuits ... 12

D. The Second and Ninth Circuits 13

III. Petitioner's Reliance on *Marshall* Is Unconvincing Because *Marshall* Is Distinguishable from the Present Facts 13

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Cases: *Page*

Agostini v. Felton, 521 U.S. 203 (1997) 10

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) ... 9

Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666 (11th Cir. 1991) 11

Golden ex rel. Golden v. Golden, 382 F.3d 348 (3d Cir. 2004) 12

In re Comer, 716 F.2d 168 (3d Cir. 1983) 8

In re Gracey, 80 B.R. 675 (1987) 8

In re Marshall, 392 F.3d 1118 (9th Cir. 2004) ...7, 8, 13, 14

Markham v. Allen, 326 U.S. 490 (1946) 10, 13

Mason v. Integrity Ins. Co., 709 F.2d 1313 (9th Cir. 1983) 8

McKibben v. Chubb, 840 F.2d 1525 (10th Cir. 1988) 11

Michigan Tech Fund v. Century Nat'l. Bank of Broward, 680 F.2d 736 (11th Cir. 1982) 11

Cited Authorities

Page

Montana v. United States, 440 U.S. 147 (1979) 10

Moser v. Pollin, 294 F.3d 335 (2d Cir. 2002) 13, 14

Nevada v. United States, 463 U.S. 110 (1983) 10

Rienhardt v. Kelly, 164 F.3d 1296 (10th Cir. 1999) 11

Storm v. Storm, 328 F.3d 941 (7th Cir. 2003) 12

Statutes:

28 U.S.C. § 2101(c) 6, 9

Rules:

Bankr. R. 8002 8

Rules of the Supreme Court of the United States, 13.2 ..... 6, 9

TABLE OF APPENDICES

Page

Appendix A — Judgment Of The United States Court Of Appeals For The Ninth Circuit Filed October 29, 2003 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed December 3, 2003 ..... 2a

RESTATEMENT OF THE ISSUE

Petitioner's statement of the issue for review is improper and ought not be accepted. Petitioner's issue blends the facts of several appeals prosecuted in the Ninth Circuit Court by the Petitioner. As noted further in this response, several of Petitioner's appeals before the Ninth Circuit Court are final, and any petition to this Court concerning several of the Ninth Circuit Court's rulings in other appeals are time barred. Reference to the Washington state proceeding in Petitioner's question is not relevant or appropriate to issues concerning the Ninth Circuit Court's determination in Cause No. 03-35317, which is the matter upon which the Petition was initiated. The sole question that is potentially jurisdictionally proper is whether the Ninth Circuit in Case No. 03-35317 appropriately addressed the "probate exception" issue albeit an issue that the Ninth Circuit recognized as being raised for the first time on appeal. Pet. App. 2a. As further noted in this Brief, Petitioner's citation to facts in other decisions of the Ninth Circuit Court is inappropriate, misleading, and jurisdictionally time barred. Petitioner's question should not be accepted.

STATEMENT OF THE CASE

This case arrives before this Court following over a decade of contentious litigation between the parties. Excluding the present Petition, Petitioner has initiated eleven separate appeals of orders from bankruptcy court to the Ninth Circuit Court of Appeals.[1]

---

[1] Case No. 02-35248, 02-35290, 02-35313, 03-35317, 03-35788, 03-35746, 03-35789, 03-35894, 03-35790, 03-35905, and 04-35814.

I. Factual Background and Proceedings

Petitioner omits substantial relevant portions of the factual background and proceedings below in this case, which facts and procedural posture, if disclosed, clearly show that this is not the case for this Court to define the parameters of the probate exception to federal jurisdiction.

As noted in the bankruptcy decision of Judge Peterson that is the subject of this Petition, Pet. App. 23a to 80a, prior to Marguerite Miller's death on August 26, 1995, her real property was subject to her confirmed Chapter 11 Plan which was filed in the Bankruptcy Court for the District of Montana as Case No. 93-30866-011. Pet. App. 30a. Respondent Douglas Miller, even prior to the Chapter 11 Bankruptcy of Marguerite Miller in 1993, had separate real estate interests within the boundaries of the Kona Ranch which were not owned by Marguerite Miller and never became subject to her Chapter 11 Bankruptcy or subsequent trust or probate proceedings. Pet. App. 76a. After Mrs. Miller's death, but before Snavely instituted the action in King County Superior Court in Washington, Mr. Miller had brought claims in Federal District Court for the District of Montana against Ms. Snavely for her tortious activities as Cause No. CV-99-147-M-DWM. Pet. App. 64a.

Snavely acknowledges that Mr. Miller filed a Chapter 11 Bankruptcy before the Washington State Court proceedings involving the Montana real estate were final. Pet. p. 4. Further, as indicated above, Mr. Miller's Chapter 11 proceedings involve property that was never a part of the Marguerite L. Miller Trust, as well as claims against Petitioner Snavely filed in Federal Court before the Washington probate/trust proceedings were filed. Snavely's Petition in this case is related to the judgment awarded against Snavely and in favor of Miller on those claims that existed

against Snavely prior to the trust probate proceedings and over which the State Court in Washington did not have jurisdiction. Pet. App. 23a to 80a. Only Snavely's claims against Miller, which Snavely reduced to a proof of claim in Miller's bankruptcy, could arguably be within the probate exception.

Were this Court to grant certiorari and review this case, the procedural result would be disastrous. The January 25, 2002 Bankruptcy Court order granting Miller a judgment of $274,706 on his counterclaims against Snavely could not be affected by any determination of this Court on the Petition for Certiorari. However, an adverse ruling against Miller in favor of Snavely on the Petition for Certiorari would result in Snavely's claims, which were calculated in the overall proceeding by the bankruptcy court, being sent back to state court in Washington with Miller's right to appeal to the Washington Appellate Court and ultimately the Washington Supreme Court. Accordingly, this is not the case for this Court to review and set parameters to the probate exception to the federal jurisdiction. In addition, there are further reasons why this Court is precluded in doing so.

As indicated in Snavely's Petition, Miller's bankruptcy, filed as Case No. 01-30752-11, United States Bankruptcy Court for the District of Montana, included a series of orders which were entered, and which are now final, that preclude the relief Snavely wants. In a series of orders commencing May 2, 2001, June 1, 2001, and June 7, 2001, the Bankruptcy Court determined that Snavely's actions continuing in State Court violated the automatic stay, denied in part and granted in part Snavely's Motion to Annul and denied reconsideration. Snavely appealed those series of orders to the United States District Court, who affirmed and appealed to the Ninth Circuit as Appeal No. 02-35248. That appeal was dismissed as moot even though Snavely argued the preclusive effect of the State Court

proceeding. App. 1a, 2a. The time for a petition for writ of certiorari from the Ninth Circuit Cause No. 02-35248 has long since expired.

Subsequently, on September 24, 2001, the Bankruptcy Court entered an order requiring Snavely to turn over a Quit Claim Deed to certain of the real property, which was formerly in the expired Trust. In addition, on November 27, 2001, the Bankruptcy Court, in the adversary proceeding, partitioned the property and granted Miller an easement to said property. Again, Snavely appealed those decisions in the Unites States District Court which were affirmed and subsequently appealed to the Ninth Circuit (Appeal No. 02-35290 and 02-35313). After oral argument in the Ninth Circuit, said appeals were dismissed as moot and/or affirmed. The time for seeking a writ of certiorari from these decisions of the Ninth Circuit have also expired.

The Bankruptcy Court then on February 26, 2002 approved the sale of Miller's partitioned real property to a non-party buyer. This real property included property that had previously been in the Trust as well as real property that had been separately owned and was never involved in the Trust. Snavely appealed the sale to the District Court which affirmed and subsequently appealed the sale to the Ninth Circuit as Appeal No. 03-35788. On July 21, 2004, the Ninth Circuit dismissed this appeal as moot, since the sale had occurred and no stay was received. This decision is final and beyond the time for a petition for a writ of certiorari.

Next, the Bankruptcy Court entered an order on March 12, 2002, ordering Snavely to release a *lis pendens* she had filed against the former Trust property. That Order was appealed by Snavely to the District Court where it was affirmed. Snavely then appealed to Ninth Circuit Court of Appeals (Appeal No.

03-35746). The appeal was denied and became final when the Ninth Circuit denied Snavely's Motion for Reconsideration on November 3, 2004. This decision also is beyond the time for a petition for a writ of certiorari.

On March 27, 2002, the Bankruptcy Court affirmed Mr. Miller's Chapter 11 Plan which called for the sale of the real property and the payment of Mr. Miller's creditors out of such sale. This plan confirmation was appealed by Snavely to the District Court, which affirmed the plan, so she subsequently appealed to the Ninth Circuit Court of Appeals (Appeal No. 03-35789). The Ninth Circuit affirmed the District Court's decision affirming the Bankruptcy Court confirmation of Mr. Miller's Chapter 11 Plan on May 3, 2005, finding in part, "We can fashion no reasonable remedy because the subject property has been sold to third parties and all allowed claims have been paid in full." Snavely has filed no petition on this cause, at this time, and the time for filing a petition will soon expire.

The Bankruptcy Court determined that attorneys for Snavely filed a fee application in Miller's Chapter 11 Bankruptcy which were duplicate fees and subsequently were disallowed. The law firm of Davis, Wright, Tremaine (DWT) appealed to the District Court who affirmed and appealed to the Ninth Circuit (Appeal No. 03-35905). In the appeal to the Ninth Circuit DWT argued the probate exception precluded the Bankruptcy Court order. The cause was also affirmed on January 28, 2005. The time for petitioning for writ of certiorari has expired.

What is left, and what Snavely requests a petition for writ of certiorari in the present case for is the judgment of the Bankruptcy Court of January 25, 2002. That judgment was based on the proofs of claim filed by Snavely and the counterclaims from Miller as indicated above and as established by the record, the counterclaims against Snavely included claims referred to the

Bankruptcy Court by the Federal District Court which originated in the 1999 Federal District Court action filed before Snavely instituted the trust proceedings in the State of Washington. The theories on which Miller recovered include claims against Snavely for interfering with Miller's sale of his real property, which had never been a part of the Marguerite L. Miller Trust.

In her Petition for a Writ of Certiorari, Petitioner misstates the case and the record from the lower courts. Specifically, Petitioner fails to acknowledge to the Court that the injunction of which Petitioner complains did not occur in the cause of action upon which the Petition was filed. Rather, the injunction took place in a proceeding, subject to a separate appeal, in which the Petitioner was not the prevailing party in the Ninth Circuit and in which Petitioner's time to petition to this Court has long since expired. *See* Ninth Circuit Court's decision in Case No. 02-35248, including denial of Petitioner's Request for Rehearing before the Ninth Circuit *en banc*. App. 1a, 2a. Petitioner's time for petitioning to this Court began to run on the injunction issue in Ninth Circuit in Cause No. 02-35248 on December 3, 2003, when the Request for Rehearing was denied. App. 2a. Snavely's Petition in this cause was filed June 27, 2005 – more than a year and a half after final judgment on the injunction and clearly in excess of this Court's 90-day time limit for filing a petition for certiorari. 28 U.S.C. § 2101(c) (2005), *Rules of the Supreme Court of the United States*, 13.2 (2005). Petitioner's claims and related arguments, utilizing the injunction decision, are jurisdictionally barred. *Id.*

Petitioner requests certiorari on a recent Ninth Circuit opinion, albeit one which did not involve any federal court intervention or control over any assets in any alleged probate/ trust proceeding. Petitioner complains belatedly of the non-applicable injunction as "the most intrusive possible kind of federal action. . . ." Petitioner for a Writ of Certiorari ("Pet.")

at 20. Petitioner focuses her argument for certiorari on an injunctive action that was the subject of a final decision of the Ninth Circuit that occurred more than 20 months ago. Petitioner's argument concerning the probate exception is without merit. The Ninth Circuit properly concluded no control was extended in the decision under review over any probate assets or proceedings. It is the Petitioner, who contending to assert a claim as the trustee, filed a claim in the Miller bankruptcy proceedings that was adjudicated by the Bankruptcy Court. In adjudicating the Trust's claim in the Order that is the subject of this Petition, Pet. App. 23a to 80a, no control over Trust assets was extended nor were any state probate proceedings subject to judicial determinations.

REASONS FOR DENYING THE PETITION

The injunction which Petitioner complains of was finally adjudicated in an earlier and separate matter in the Ninth Circuit with rehearing being denied by Order dated December 3, 2003. App. 1a, 2a. Petitioner never filed a timely Petition for a Writ of Certiorari with this Court to review the December 3, 2003 decision and, as such, the time for filing the appeal has long since terminated. Now, however, Petitioner seeks to appeal to this Court a more recent decision by the Ninth Circuit and "bootstrap" the earlier decision regarding the injunction into the present matter. Additionally, contrary to Petitioner's claims, there is no circuit split on the application of the probate exception to federal jurisdiction. Even assuming, *arguendo*, that there was such a split, Petitioner fails to meet the test under any circuit's application of the probate exception. Finally, despite Petitioner's efforts, the present dispute is considerably different from the Ninth Circuit's decision in *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004). Rather than being suggestive of a deep confusion on the part of the Ninth Circuit, the Court of Appeals' decision

in *Marshall* and the present case are consistent with each other, Ninth Circuit jurisprudence, and the exercise of federal jurisdiction in general.

I. Petitioner Misstates the Record and the Cornerstone of Petitioner's Argument Is Jurisdictionally Barred

Appeals from a decision by bankruptcy courts must be done within 10 days of entry of judgment. Bankr. R. 8002 (2005). Finality in bankruptcy proceedings is viewed more flexibly than in other civil proceedings. *In re Gracey*, 80 B.R. 675, 676-77 (1987), citing *In re Comer*, 716 F.2d 168, 171 (3d Cir. 1983). This is because certain proceedings in bankruptcy court are so distinct and conclusive as to make them appealable as a matter of right. *Gracey*, at 677, citing *Mason v. Integrity Ins. Co.*, 709 F.2d 1313, 1317 (9th Cir. 1983). In bankruptcy courts there are exceptions to the prohibition against interlocutory appeals, and as in the litigation between the parties in the case *sub judice*, numerous interlocutory decisions may result in several separate appeals, which all emanate from the same bankruptcy proceeding.

Petitioner's window of opportunity to appeal the Ninth Circuit's decision concerning the injunction began to run December 3, 2003, when the Appeals Court denied Petitioner's request for rehearing *en banc*. App. 2a. This appeal is jurisdictionally defective as to anything related to the injunction or state court activities referenced in the Petition. Pursuant to the United States Code and the rules of this Court, a petition, not filed within 90 days of final judgment, will not be heard:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review

> *shall be* taken or applied for within ninety days after the entry of such judgment or decree.

28 U.S.C. § 2101(c) (emphasis added).

Additionally:

> The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time.

Rules of the Supreme Court of the United States, 13.2.

Petitioner's counsel improperly interjected the Bankruptcy Court's Injunction Order when this matter was subject to a separate appeal for which a final decision was entered by the Ninth Circuit. App. 1a, 2a. If a party is displeased with a bankruptcy court's decision, the party may appeal to the district court and, if necessary, the Court of Appeals. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995). Petitioner appealed the injunctive decision, obtained an adverse ruling, and failed to timely file a Petition to this Court after rehearing was denied. App. 1a, 2a.

Not including the present Petition before this Court, Petitioner has unsuccessfully appealed to the Ninth Circuit Court numerous times in Miller's bankruptcy proceeding. Undaunted, Petitioner Snavely seeks to have this Court review prior decisions by the Court of Appeals which Petitioner never appealed and for which the time to appeal has ended. Such review, however, is barred by this Court's operating rules, the doctrine of the law of the case, mootness and *res judicata*.

The doctrine of law of the case states that a court should not reopen issues decided in earlier stages of the litigation.

Agostini v. Felton, 521 U.S. 203 (1997). Third parties have acted upon prior court orders of the Ninth Circuit and finalized their title to property sold in the bankruptcy proceedings. The Ninth Circuit Court's mootness decision, covering the injunctive relief, applies equally to these proceedings. App. 1a, 2a.

Alternatively, Petitioner's claim should be barred by *res judicata*. Under *res judicata*, a court's final judgment on the merits bars subsequent claims by that party based on the same cause of action. *Montana v. United States*, 440 U.S. 147 (1979). Causes of action are the same if they arise from the same transaction. *Nevada v. United States*, 463 U.S. 110 (1983).

II. There Is No Circuit Split on the Application of the Probate Exception

Petitioner goes to considerable lengths to create the appearance of confusion among the various circuit courts as to the application of the probate exception. No such confusion is present. Indeed, closer examination of each circuit's application reveals that Petitioner loses under any test, simply because the tests are essentially the same: each one, at some point, looks to whether the federal court exerted control over trust assets or interfered with the probate proceedings – the exact standards required by this Court in *Markham v. Allen*, 326 U.S. 490 (1946).

A. The Fifth and Eleventh Circuits

Petitioner fails to satisfy the test applied by the Fifth and Eleventh Circuits. This test looks, essentially, to whether the federal court interferes with the probate proceedings or assumes general jurisdiction of the probate or control of the property in custody

of the state court. *Glickstein v. Sun Bank/Miami, N.A.*, 922 F.2d 666, 672 (11th Cir. 1991). The Eleventh Circuit's reading of the probate exception allows for federal jurisdiction in an action requiring the construction of a will. *Michigan Tech Fund v. Century Nat'l. Bank of Broward*, 680 F.2d 736 (11th Cir. 1982). If interpreting a will fails to constitute control or general jurisdiction over a probate matter, how does a bankruptcy court's adjudication of a trust's claim, without any exercising of control, satisfy a test?

B. The Fourth, Sixth, Eighth, and Tenth Circuits

Similarly, Petitioner's argument fails under the test used by the Fourth, Sixth, Eighth and Tenth Circuits. There, the essential question is whether the matter could be heard in a state court of general jurisdiction. *Rienhardt v. Kelly*, 164 F.3d 1296 (10th Cir. 1999), citing *McKibben v. Chubb*, 840 F.2d 1525 (10th Cir. 1988). If general state court jurisdiction is appropriate, then, provided diversity exists, federal jurisdiction is also warranted. *Id.* Thus, in *Rienhardt*, the Court found that a claim alleging tortious interference with inheritance which caused the decedents to change the beneficiary of their will properly belonged in state probate court, but Plaintiff's claims seeking damages based on defendant's wrongful act could be heard in federal court. *Rienhardt*, 164 F.3d at 1301.

Under the present facts, Petitioner fails under the test applied in the Fourth, Sixth, Eighth and Tenth Circuits. Respondent's counterclaims – breach of common law of good faith and fair dealing, tortious interference with business relations, and intentional infliction of emotional distress – all could be heard in state court. As such, because diversity exists, under the test from the Fourth, Sixth, Eighth and Tenth Circuits, federal jurisdiction is appropriate.

C. The First, Third, and Seventh Circuits

Petitioner's argument fails under the test applied in the First, Third, and Seventh Circuits as well. The Third Circuit has discerned three general principles regarding federal jurisdiction in probate matters. *Golden ex rel. Golden v. Golden*, 382 F.3d 348 (3d Cir. 2004). Specifically, the Court indicated federal courts have no power to actually probate a will. Additionally, where a will has been probated, a federal court is not allowed to take action that would contradict a judgment of the probate court. Finally, federal courts may exercise jurisdiction over an otherwise barred probate action if the action would be maintainable *inter partes* under the state court's general jurisdiction. *Id.* 382 F.3d at 358. Ultimately, the federal courts are allowed to hear *in personam* diversity actions, provided they are grounded in recognized law and their resolution will not undermine the past probate of a will or result in a federal court assuming general jurisdiction of a will. *Id.* The Seventh Circuit has indicated that, after determining the case does not involve the probate of an estate, a court should look to see whether it determines a matter "ancillary" to the probate. *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003). In *Storm*, the Seventh Circuit found that although plaintiff's complaint did not seek control over the estate, by bringing a claim for wrongful interference with an inheritance expectancy plaintiff was essentially trying to contest the will and, as such, the state probate court was the proper venue to hear the case. *Id.*, 328 F.3d 941. No such probate related claims existed in the cause under appeal, the bankruptcy court merely adjudicated the trust claim filed in the bankruptcy proceeding. No control was exercised over probate matters.

D. The Second and Ninth Circuits

Finally, Petitioner's claim has already failed under the test applied by the Second and Ninth Circuits. The Second Circuit has indicated a two-part test for determining whether the probate exception applies. *Moser v. Pollin*, 294 F.3d 335 (2d Cir. 2002), *see also Marshall*, 392 F.3d 1118. The first question asks whether the federal court is being asked to directly probate a will or administer an estate. The second question focuses on matters which are indirectly related to probate and, thus, applies the *Markham* standards: would exercising jurisdiction over the matter cause the federal court to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of property in the custody of the state court." *Id.*, citing *Markham*, 326 U.S. at 494. In the present appeal, no control was exercised over probate assets.

III. Petitioner's Reliance on *Marshall* Is Unconvincing Because *Marshall* Is Distinguishable from the Present Facts

The Ninth Circuit, in *Marshall*, determined the bankruptcy court had interfered with probate proceedings and assumed general jurisdiction of the probate when it entered a $450 million judgment for the surviving spouse against decedent's estate. *Marshall*, 392 F.3d 1118. The Appeals Court decision was predicated on the fact that the "bankruptcy court's judgment was based specifically on Vickie Lynn Marshall's interest in J. Howard Marshall II's estate." *Id.* at 1134. Additionally, because the probate court had ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against the estate's executor, this determination was binding on all courts. Indeed, an essential element of Vickie Lynn Marshall's claim was that the estate executor (and decedent's son) had falsified documents following

decedent's death in order to prevent Vickie Lynn Marshall from collecting a gift she claimed decedent intended to leave for her upon his death. The Appeals Court held that such a determination was clearly within the exclusive jurisdiction of the state probate court. Both the bankruptcy court and the district court, by finding that the decedent had, in fact, intended to leave such a gift, invaded the jurisdiction of the state probate court by exerting some measure of control over the estate.

The decision in the present case is consistent both with the *Marshall* decision and with Ninth Circuit jurisprudence in general. While Petitioner argues the Ninth Circuit's opinions in the two cases are suggestive of not just inconsistencies between the circuits, but also of great confusion within the Ninth Circuit itself, closer examination indicates otherwise. The *Marshall* opinion essentially turned on the fact that Vickie Lynn Marshall, by bringing a claim for tortious interference with a gift expectancy, asked the bankruptcy court to find that she was entitled to more money than she was left in the will. The Ninth Circuit held that regardless of what Vickie Lynn Marshall called her claim, "it is in substance nothing more than a thinly veiled will contest." *Id.* at 1135, citing *Moser v. Pollin*, 294 F.3d 335, 340-41 (2d Cir. 2002).

No contest of the will is present in the litigation in which this Petition has been filed. Respondent's claims against Bonnie Snavely, individually, of breach of common law of good faith and fair dealing, tortious interference with business relations, and intentional infliction of emotional distress all stand alone and were under any probate exception test proper for bankruptcy court determination. The injunctive judicial determinations of which Petitioner complaints were separate and distinct legal proceedings, i.e., a matter appealed to the Ninth Circuit, upon which rehearing was requested, but for which no timely Petition

for a Writ of Certiorari was ever timely filed. The trust filed a proof of claim which was adjudicated in the bankruptcy court and then appealed to the district court and the Ninth Circuit. The probate exception to federal jurisdiction simply does not apply because the Courts in this Appeal never exerted any control over trust assets or probate proceedings.

CONCLUSION

For the foregoing reasons, the petition is procedurally, jurisdictionally, and substantively barred. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LONNIE J. DALE
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, MT 59806-4947
(406) 728-1455

Counsel for Respondent